

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JACK SILVERMAN (DECEASED)	:	
FRANCES SILVERMAN (DECEASED)	:	
	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1978 through 1982.	:	

Petitioners, Jack Silverman (deceased) and Frances Silverman (deceased), c/o Pegg & Pegg, 370 Lexington Avenue, New York, New York 10017, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 through 1982 (File No. 802313).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 30, 1987 at 9:30 A.M., with all briefs to be submitted by October 16, 1987. Petitioners appeared by John P. Zampino, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioners were domiciled in, and resident individuals of, the State of New York during the years 1978 through 1982, inclusive.

FINDINGS OF FACT

1. Prior to 1978, Jack Silverman and Frances Silverman, husband and wife (hereinafter the "Silvermans"), were domiciliaries and residents of the State of New York. Their 1977 New York State Income Tax Resident Return bore the home address 847 Ivy Hill Road, Woodmere, New York, and was marked "FinalReturn." The Silvermans did not file New York State returns for the years subsequent to 1977.

2. On January 31, 1985, the Audit Division issued two statements of personal income tax audit changes to the Silvermans whereon adjustments were made for each year at issue holding their income taxable to New York State based on the same explanation:

"Based upon audit, you have been deemed to be residents of New York State.

Per Sec. 102.2(2),(4),(5)(e) of the personal income tax regulations."

3. On April 8, 1985, the Audit Division issued two notices of deficiency against the Silvermans:

(a) one asserting New York State personal income tax for the years 1978, 1979 and 1980 of \$104,994.00, plus interest of \$65,541.61, for a total due of \$170,535.61; and

(b) the other asserting New York State personal income tax for the years 1981 and 1982 of \$18,159.00, plus interest of \$5,411.98, for a total due of \$23,570.98.

4. In 1961, the Silvermans purchased a house located at 847 Ivy Hill Road, Woodmere, New York, at a cost of \$65,000.00. In 1967, they spent \$70,000.00 to \$80,000.00 on capital improvements to the house.

5. In or about 1935, Jack Silverman founded a business known as Modern Maid Food Products, Inc. ("Modern Maid"). Said business, which had its principal place of business in New York, was engaged in the manufacture and sale of flour mixtures for doughnuts, waffles and other food items.

6. Modern Maid became a publicly-held corporation in 1969. The Silverman family owned approximately 15 percent of the stock, which was the controlling interest. Jack Silverman was the president and chairman of the board of directors of Modern Maid.

7. In or about 1974, the Silvermans leased an apartment located at 333 Sunset Avenue, Palm Beach, Florida. Said apartment consisted of three bedrooms, three bathrooms, a kitchen, a dining room, a living room and a balcony.

8. Prior to 1978, Jack Silverman resigned as president of Modern Maid and his son,

Stanley Silverman, became president. However, Jack Silverman retained his position as chairman of the board. At this time, Jack Silverman was basically in semi-retirement. He did not work for Modern Maid every day during this period.

9. In February 1978, all the stock of Modern Maid was acquired by Spillers Limited, a United Kingdom corporation. Subsequent to said acquisition, Jack Silverman was provided with a small office at Modern Maid to be used when he was in New York.

10. Subsequent to the acquisition, Jack Silverman rendered services to Modern Maid as a consultant. Initially he rented an office in Palm Beach, Florida. Such office was maintained for only a few months. Subsequently, any services rendered to Modern Maid by Jack Silverman from Florida were so rendered from the Florida apartment. As a consultant, his compensation was substantially reduced from what it had been prior to the acquisition.

11. The Silvermans spent in excess of \$34,000.00 to decorate their Florida apartment. Their most valuable possessions were moved to Florida. Such items included art work, silverware, china, jewelry, furs and personal memorabilia. The Silvermans did not move the furniture situated in their Woodmere home to Florida. The furniture was not suitable for the decor of the Florida apartment and the Silvermans believed that the Woodmere home would be easier to sell if it was shown furnished. The Florida residence was always ready for use. The Silvermans entertained quite often in Florida and family members and friends stayed overnight.

12. In May 1975, the Woodmere house was listed with a real estate broker and was offered for sale at \$200,000.00 through newspaper advertisements. In August 1975, the asking price was reduced to \$125,000.00. After 1975, Jack Silverman spoke to the broker a few times per year with respect to the sale of the Woodmere house.

13. The record is not clear with respect to the period of time for which the Woodmere house was offered for sale. The record is also unclear as to the degree of effort made to sell the house. One real estate broker testified that the house "wasn't on the market from '75 to '80. It was off the market for a while. I relisted it, not completely off, but it wasn't that active. As I

said, I would call and say, may I show the house?" She further testified that the house went on the active market in 1982 for about \$500,000.00. Then it was reduced to \$475,000.00 and subsequently to \$399,000.00. The Woodmere house was eventually sold in 1983 for \$380,000.00.

14. Ms. Ethel Washington, the Silvermans' live-in housekeeper for over 30 years, testified that the Silvermans kept the Woodmere house "so when they come home to visit the children, they would have somewhere to stay and then when they went on trips, they would leave from New York." During the years at issue, the Silvermans generally came to New York during the summer months. The Silvermans were not particularly anxious to dispose of the Woodmere house. Jack Silverman would not sell the house unless he received what he felt was a good price. He believed that, if he sold the house, it would cost more to stay at a hotel when he and his wife came to New York during the summer months than it would cost to retain the house.

15. During the years at issue, Jack Silverman maintained his membership in the Woodmere Club, Inc., a New York country club. Review of the statements from said club shows that for 1978 and 1979, the January through April statements were sent to Mr. Silverman's Florida address, while the May through December statements were sent to his New York address. For the years 1980, 1981 and 1982, all statements were sent to the New York address. Such review also discloses that Mr. Silverman used the club's facilities on numerous days during the months of May through November of each year at issue.

16. Review of a check analysis prepared by the auditor for each year at issue shows substantially more checking account activity in New York than in Florida. Although most of the New York activity was during the summer months, many checks were written for New York expenditures during the balance of each year.

17. Mr. Silverman and/or Mrs. Silverman spent the following number of days in New York during the years at issue:

Year

Days in New York

1978	175
1979	176
1980	213
1981	144
1982	155

18. On many occasions when Jack Silverman travelled outside of Florida, Frances Silverman would remain with Ethel Washington, their housekeeper, at the Silvermans' Florida home.

19. During two of the years at issue, the Silvermans subscribed to the South Shore Record, a local New York newspaper. The Silvermans maintained their memberships in a New York religious temple and made contributions to New York political campaigns. In 1981, Mr. Silverman owned two automobiles: a Cadillac in Florida and a Pontiac in New York. The Cadillac was registered in Florida in 1978. Mr. Silverman was a member of the Board of Directors of Long Island Jewish Hospital, a New York hospital. He also maintained his affiliation with the United Jewish Appeal Federation in New York. Additionally, he was very involved with Boys' High School in Brooklyn and helped found the school's annual reunion.

20. According to the Silvermans' Federal tax returns, Jack Silverman was a partner in Landoil '79 Associates, a New York partnership, during the years 1979 through 1982, inclusive. Said returns also showed that during 1982 Jack Silverman was a partner in two other New York partnerships, Exeter Company and Fairfax Company.

21. Robert Pegg, C.P.A., tax advisor and financial advisor to the Silvermans, advised them to spend less than 183 days in New York during each year at issue. The Silvermans spent more than 183 days in New York during 1980 solely due to major hip surgery which Frances Silverman had undergone in New York. Such surgery and subsequent recovery necessitated her presence in New York for at least 30 days.

22. The Silvermans had a safe in their Florida home and a safe deposit box at First American Bank in Palm Beach, Florida. They also maintained a safe deposit box in New York.

They kept most of their clothing in Florida.

23. The Silvermans were members of various religious organizations and social clubs in Florida, including Temple Emanu-El, Jewish Federation of Palm Beach, Sisterhood Temple Emanu-El, Palm Beach Round Table, the Breakers, and a dinner club. They attended religious services at a temple in Florida. Frances Silverman performed volunteer work from time to time at a local hospital in Florida. During each year at issue, the Silvermans socialized and entertained in Florida, where most of their friends lived. When in New York, they entertained only members of their immediate family. The Silvermans visited physicians in both Florida and New York.

24. On January 24, 1979, the Silvermans filed a Florida Declaration of Domicile wherein Jack Silverman declared that both he and his wife became bona fide residents of Florida on November 29, 1977. On November 29, 1977, the Silvermans registered to vote in Florida. Jack Silverman voted in Florida on five occasions during the years 1978 and 1980. Three such votes were placed through absentee ballots. Frances Silverman voted in Florida on eight occasions during the years 1978, 1980, 1982 and 1984. Two such votes were placed through absentee ballots.

25. The Silvermans had Florida drivers' licenses. Frances Silverman's license was issued in 1978. The record contains no documentation establishing the year in which Jack Silverman's license was issued. Jack Silverman opened a checking account at First American Bank in Palm Beach, Florida in 1978. He also maintained charge accounts in Florida in 1978. The address reported on the charge account statements was that of his Florida home.

26. The Silvermans filed a Federal income tax return for each of the years at issue. On all returns, except that filed for 1979, they used their Florida address. The 1979 return was filed using the address "c/o Pegg & Pegg, 370 Lexington Avenue, New York, New York 10017." Federal forms K-1 (partner's information returns) issued to Jack Silverman for the years 1979 through 1982 listed the Florida address. The 1977 through 1981 wage and tax statements issued

to Jack Silverman for his consulting services and pension from Modern Maid reflected his Florida address. Jack Silverman filed employer's quarterly tax returns for household employees during the years at issue. The Florida address was reported on each return. Various other forms filed with respect to his household employee listed the Florida address.

27. The Silvermans filed a Florida intangible property tax return for each of the years 1978 through 1982. On the 1978 return, the Silvermans reported the date they moved to Florida as November 29, 1977.

28. On July 15, 1981, Jack and Frances Silverman each executed a Last Will and Testament. Both wills provided that:

"FIRST: Authorization for New York Probate. Although I am a Florida domiciliary I authorize and direct my Executor, in its judgment and discretion, to offer this my Last Will and Testament and any Codicil to it for probate in a Surrogate's Court in the State of New York and direct that in such event the disposition of my property thereunder be governed by the laws of the State of New York."

29. Jack Silverman died on June 28, 1982. His obituary notice was placed in a New York newspaper. Frances Silverman died on August 2, 1985. Letters Testamentary on the Estate of Jack Silverman were issued by the Surrogate's Court of the County of New York on October 1, 1982. A certificate of letters testamentary dated October 15, 1982 states that Jack Silverman was "late of Florida". Letters Testamentary on the Estate of Frances Silverman were issued by the Surrogate's Court of the County of New York on September 30, 1985. A certificate of letters testamentary dated October 3, 1985 states that Frances Silverman was "late of the County of New York."¹

30. Both the United States and Florida estate tax returns filed for the Estate of Jack Silverman listed his domicile at time of death as Palm Beach, Florida. The name and location of

¹This appears to be incorrect as there is nothing in the record to indicate that Frances Silverman ever lived in New York County. It is noted that the Silverman's Woodmere home was in Nassau County.

the court where the will was probated or estate administered was reported as the New York County Surrogate's Court. Likewise, the United States Estate Tax Return filed for the Estate of Frances Silverman listed her domicile at time of death as Palm Beach, Florida and the name and location of the court where the will was probated or estate administered was reported as the New York County Surrogate's Court.

31. After the death of Jack Silverman in 1982, Frances Silverman lived in Florida at her Florida home. Since the years subsequent to 1982 are not at issue, the record contains no information with respect to her movements between Florida and New York from the time of Jack Silverman's demise to the time of her death.

32. Petitioner's representative submitted 117 requested findings of fact. Requested findings of fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 25, 29, 32, 38, 41, 42, 45, 46, 47, 48, 50, 51, 53, 54, 55, 61, 62, 63, 69, 74, 75, 76, 79, 80, 81, 82, 83, 85, 86, 88, 89, 90, 94, 95, 96, 101, 102, 105, 106, 108, 109, 111, 113 and 116 are accepted and incorporated into the determination herein. Requested findings of fact 15, 18, 19, 34, 37, 40, 43, 52, 56, 66, 78, 92, 93, 97, 98, 99, 103, 114 and 115 are accepted in part. The accepted parts are incorporated into the determination herein. The rejected parts were mainly unsubstantiated. Requested findings of fact 17, 65, 67, 110, 112 and 117 are rejected as conclusionary in nature. Requested findings of fact 20, 21, 22, 23, 24, 26, 27, 44, 49, 60, 68, 72, 84, 91 and 104 are rejected as unsubstantiated. Requested findings of fact 13, 28, 30, 31, 33, 35, 36, 39, 57, 58, 59, 64, 70, 71, 73, 77, 87, 100 and 107 are rejected as irrelevant.

CONCLUSIONS OF LAW

A. That 20 NYCRR 102.2(d)(2) provides, in pertinent part, that:

"A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the

intention is to remain there only for a limited time...."

B. That the burden of proof is upon petitioners to show that the necessary intention to effect a change in domicile existed (Tax Law § 689[e]). "The test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (citation omitted). The evidence to establish the required intention to effect a change in domicile must be clear and convincing" (Bodfish v. Gallman, 50 AD2d 457). "[T]o effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another" (Aetna Nat'l. Bank v. Kramer, 142 App Div 444).

C. That petitioners have failed to sustain their burden of proof, imposed pursuant to Tax Law § 689(e), to show that they intended to abandon their New York domicile and acquire a new domicile in Florida. The facts that Jack Silverman maintained an office at Modern Maid subsequent to his move; that the Silvermans did not move their furniture to Florida; that a valid, consistent attempt to sell the Woodmere home was not shown; that the Silvermans generally came to New York for the summer months; that Jack Silverman continued to maintain social, business and religious ties in New York; that Jack Silverman maintained an automobile in New York; that the Silvermans subscribed to a local New York newspaper; that the Silvermans maintained a safe deposit box in New York; and that the Silvermans' wills authorized probate in the State of New York, with each will actually having been probated by a New York court, among other facts, lead to the conclusion that the Silvermans had no real intention to abandon New York as their domicile.

D. That the Silvermans were domiciled in New York State during the years 1978 through 1982, inclusive.

E. That Tax Law § 605(a)(1)(A) provides that any person domiciled in New York is a resident individual for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the following requirements: (1) he maintains no permanent place of abode in

this State during such year; (2) he maintains a permanent place of abode elsewhere during such entire year; and (3) he spends in the aggregate no more than 30 days of the taxable year in this State.

F. That petitioners did not meet the aforesaid requirements during any of the years at issue. Accordingly, they were resident individuals of the State of New York during each of the years 1978 through 1982, inclusive.

G. That the petition of Jack Silverman (deceased) and Frances Silverman (deceased) is denied and the notices of deficiency issued against them on April 8, 1985 are sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York
March 24, 1988

ADMINISTRATIVE LAW JUDGE